



STATE OF NEW YORK

**UNEMPLOYMENT INSURANCE APPEAL BOARD**

PO Box 15126

Albany NY 12212-5126

**DECISION OF THE BOARD**

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Mailed and Filed: MAY 30, 2023

IN THE MATTER OF:

Appeal Board No. 628121

PRESENT: MICHAEL T. GREASON, MEMBER

In Appeal Board Nos. 628119, 628120 and 628121, the claimant appeals from the decisions of the Administrative Law Judge filed February 15, 2023, that sustained the Commissioner of Labor's timeliness objection and continued in effect the revised determinations holding the claimant ineligible to receive benefits, effective November 8, 2020 through September 5, 2021, on the basis that the claimant was not capable of work; charging the claimant with overpayments of \$7,507.50 in Pandemic Unemployment Assistance (PUA) recoverable pursuant to Section 2102 (h) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020 and 20 CFR Section 625.14 (a) and \$10,500 in Federal Pandemic Unemployment Compensation (FPUC) benefits repayable pursuant to § 2104 (f) (2) of the Coronavirus Aid, Relief, and

Economic Security (CARES) Act of 2020; and charging a civil penalty of \$2,701.12 on the basis that the claimant made willful misrepresentations to obtain benefits.

The Administrative Law Judge held hearings at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances on behalf of the claimant and the Commissioner of Labor.

Based on the record and testimony in this case, the Board makes the following

**FINDINGS OF FACT:** The claimant filed a claim for benefits effective October 5, 2020. He subsequently worked on November 7, 2020; on that day, he injured his neck and spine. The claimant sought medical treatment on November 9, 2020 and was advised by his physician that he could not work due to his injury.

Thereafter, the claimant certified for benefits on January 12 and 25, 2021; February 1, 2, 4, 8, 15, and 22, 2021; March 1, 8, 15, 22 and 29, 2021; April 5, 12, 19 and 26, 2021; May 3, 10, 17, 24 and 31, 2021; June 7, 14, 21 and 28, 2021; July 5, 12, 19 and 26, 2021; August 2, 9, 16, 23 and 30, 2021; and September 6, 2021, relative to each of the statutory weeks during the period of November 8, 2020 through September 5, 2021. In each certification, he reported that he was ready, willing and able to work in that particular week. As a result of his certifications, the claimant received \$7,507.50 in PUA benefits and \$10,500 in FPUC benefits. On December 6 and 20, 2020, the claimant submitted electronic statements to the Department of Labor, in which he said that he was not able to work due to his injury. On September 15, 2021, the claimant advised a Department of Labor representative that he still could not work due to his injury.

A notice of determination dated September 23, 2021, advising the claimant that he was ineligible to receive benefits, effective November 8, 2020 and until the reason for his ineligibility ended, on the basis that he was not capable of work, was mailed to the claimant. The claimant received the determination and requested a hearing on September 14, 2022. On October 6, 2022, the Department of Labor issued a revised notice of determination holding the claimant ineligible to receive benefits on the basis that he was not capable of work, effective November 8, 2020 through September 5, 2021. The notice specifically advised the claimant that the determination revised the one previously sent dated September 23, 2021 and that the revised determination would be included in his hearing. The revised notice also contained the additional determinations of recoverable overpayments of PUA and FPUC benefits and wilful misrepresentation.

**OPINION:** The credible evidence establishes that the Commissioner of Labor's timeliness objection should be overruled. It is well-settled that a revised determination that specifically advises a claimant that the determination is revising one that was previously issued and further will be included in the claimant's previously requested hearing, converts an otherwise untimely hearing request to a timely one. As the revised determination holding the claimant ineligible to receive benefits on the basis that he was not capable of work meets this criteria, we find that his hearing request of September 14, 2022 was timely. The claimant therefore is entitled to a decision on the merits of that determination. We further note that there was no actual issue of timeliness relative to the determinations of recoverable overpayment of

benefits and wilful misrepresentation since these determinations were issued after the claimant requested a hearing. Therefore, those issues are before us as well and now will be decided.

The credible evidence also establishes that the claimant was not capable of work during the period of November 8, 2020 through September 5, 2021. In so finding, we give greater weight to the claimant's prior statements to the Department of Labor, last made on September 15, 2021, that he could not work during this period due to his injury. The claimant does not dispute that he made these statements. As he was not capable of work, he was not entitled to benefits and was overpaid. The overpayments are recoverable pursuant to federal law.

The credible evidence also establishes that the claimant made wilful false statements each time that he certified that he was ready, willing and able to work in each of the weeks at issue, when in fact he knew that he was not able to work because of his injury. As the claimant's false certifications resulted in the payment of benefits, we find that the civil penalty was properly imposed.

DECISION: The decisions of the Administrative Law Judge are reversed.

The Commissioner of Labor's timeliness objection is overruled.

In Appeal Board Nos. 628119, 628120 and 628121, the revised determinations holding the claimant ineligible to receive benefits, effective November 8, 2020 through September 5, 2021, on the basis that the claimant was not capable of work; charging the claimant with overpayments of \$7,507.50 in Pandemic Unemployment Assistance (PUA) recoverable pursuant to Section 2102 (h) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020 and 20 CFR Section 625.14 (a) and \$10,500 in Federal Pandemic Unemployment Compensation (FPUC) benefits repayable pursuant to § 2104 (f) (2) of the Coronavirus Aid,

Relief, and Economic Security (CARES) Act of 2020; and charging a civil penalty of \$2,701.12 on the basis that the claimant made willful misrepresentations to obtain benefits, are sustained.

The claimant is denied benefits with respect to the issues decided herein. (Al reclamante se le niegan beneficios con respecto a los temas decididos en el presente.)

MICHAEL T. GREASON, MEMBER